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No. 91-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS,
Petitioners,

v.

TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case began when

> [f]our railroad employees sued the Transportation Communications International Union ("the union"). The union is the collective bargaining representative for the employees under the Railway Labor Act ("RLA"), 45 U.S.C. § 152. One of the plaintiffs, Kathryn A. Kidwell, is a member of the union. The other three plaintiffs, Michael S. Coffman, Helen Eades, and Ramona J. Ellis, are not. [Pet. App. 2a-3a (footnotes omitted).]

The complaint raised various claims regarding

> [u]nion security provisions in the collective bargaining agreement requir[ing] that all employees pay an agency fee, comprising the dues, initiation fees, and assessments of union members. As part of the agency shop relationship, the employees are required, as a condition of employment, to pay the agency fee to the union that is voted the collective bargaining representative; however, they are not required to become union members. [Pet. App. 3a.]

Given the structure of the union security agreement and the union's understanding of the governing law, TCU (a) informed the covered employees of their option between full union membership and non-member fee payer status, and (b) further informed those employees that members are required to pay full union dues while non-member fee payers are afforded an opportunity to object to financing certain union activities and, on so doing, pay only a reduced fee. Fourth Circuit App. 249, 259, 264, 266.[1] *See also Hogan v. Brotherhood of Railway Clerks*, 817 F.2d 248, 250 (4th Cir. 1987) (TCU, then known as the Brotherhood of Railway Clerks, "has given [represented employees] notice of their rights . . . to withdraw from the Union").

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[1] The court of appeals outlined TCU's objection procedures as follows:

> [U]nder the union's current procedure, in each calendar year, for thirty days after receiving an April notice, nonmember employees may object to the expenditure of their fees on activities unrelated to collective bargaining. An objector's agency fee then will be reduced by a set percentage. The union has an independent legal expert decide which activities are chargable and which are not, and a certified public accountant prepares the accompanying accounting materials. The union's newspaper publishes the breakdown between chargeable and nonchargeable expenses. An objector who disagrees with the amount of fee reduction may challenge it before a neutral arbitrator. The union holds all of the objector's fee payment in an interest-bearing escrow account pending the decision. The union pays all costs of the arbitration. [Pet. App. 3a.]

So far as relevant here, the district court,

> [o]n cross motions for summary judgment . . . held that the union had to permit objecting union members to pay reduced dues. The [district court] judge also held that the union's procedure for handling objections was permissible and refused to determine the actual amount of fees payable by objectors. He denied class certification of all past and future objectors; however, he certified the limited class of union members who either were not told of an opportunity to object or objected and were denied a reduction. [Pet. App. 4a (footnote omitted).]

On cross-appeals from the judgment of the district court, the Fourth Circuit (Murnaghen, J., joined by Ervin, C.J., and Phillips, J.), ruled that "[t]he judgment is reversed as to whether a union member can object to paying the portion of union dues attributable to noncollective bargaining activities, and otherwise affirmed." Pet. App. 44a.[2]

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[2] In the courts below, Ms. Kidwell, a named plaintiff and petitioner here, was the representative of a class of objecting TCU members. Pet. App. 78a. While noting this fact in passing, Pet. 9, the *certiorari* petition identifies the named plaintiffs as appearing in their individual capacities. Pet. cover and pp. ii, 1 & 4. *Compare Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317-318 (1988); *Rendon v. AT&T Technologies*, 883 F.2d 388, 398 n.8 (5th Cir. 1989)

ARGUMENT

I. THE REQUIREMENT THAT FULL UNION MEMBERS PAY FULL UNION DUES

It is well-settled: that individuals, who are (a) employed by a railroad, (b) part of an employee group that has selected an exclusive bargaining representative through the processes of the Railway Labor Act and (c) covered by a union security agreement, have an absolute right to choose between being union members or being non-member fee payers; and that non-member fee payers have the further right, by filing an objection, to a pro-rata reduction in their fee for union expenditures on "non-collective bargaining" activities. *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).[3]

Both the district court and the court of appeals found that the respondent union in this case fully and fairly advised all the employees in the bargaining units the union represents of their right to be non-member fee payers if the employee so chooses, and has established and administered a full and fair system for according fee payers their "objection" rights.

Against that background, the petitioners' claim here reduces to the proposition that the RLA or the Constitution imposes an additional obligation on RLA unions: the obligation to afford individuals, who *refuse* to meet the union's membership requirement of paying the full dues

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[3] *Ellis* holds that "objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining agreement and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as the exclusive representative of the employees in the bargaining unit." 465 U.S. at 448.

set through the union's democratic procedures, the right to be full union members *on their own financial terms.*[4]

All unions—including those that act as exclusive bargaining representatives—are private associations. *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944). And so far as we are aware, or petitioners show, neither Congress nor this Court has ever required such an association to accord membership to individuals who refuse to comply with the association's uniform, non-discriminatory rules. Any such requirement, we note, would raise the most sensitive free association questions. *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1981).

Not surprisingly, then, the court of appeals *rejected* the petitioners' claim. Its opinion—which is by far the most comprehensive and the most fully reasoned treatment in the lower courts of the question presented here—is solidly grounded in this Court's "union security" precedents from *Machinists v. Street*, *supra*, through *Communications Workers v. Beck*, 487 U.S. 735 (1988). Indeed, the *certiorari* petition all but concedes as much by concentrating its fire on the supposed unfairness of the law Congress wrote, as elaborated by this Court, rather than on any defect in the court of appeals' analysis of this Court's decisions. And, while the petition argues that there is a conflict between the decision below and *Marker v. Shultz*, 485 F.2d 1003 (1973), the argument in that regard is frivolous. *Marker* does not even remotely concern, much less consider, the matter at issue here.

A. The Railway Labor Act

1. The court of appeals' basic holding—"[t]hat the right to object is intended to benefit *only* nonmembers,"

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[4] Under the Labor-Management Reporting and Disclosure Act local unions cannot raise dues without a direct vote of the membership, 29 U.S.C. § 411(a)(3)(A), and national unions cannot raise dues without a vote of the membership or of their duly elected and authorized representatives, 29 U.S.C. § 411(a)(3)(B).

Pet. App. 19a, (emphasis in original)—follows directly from this Court's decision in *Communications Workers v. Beck*, *supra*. The Fourth Circuit read *Beck* as follows:

> In *Beck*, 487 U.S. 735 (1988), the Court found the political objection limitation of the RLA present in the NLRA. The Court read *Street* to hold that "§ 2, Eleventh of the RLA does not permit a union, over the objections of *nonmembers*, to expend compelled agency fees on political causes," 487 U.S. at 745 (emphasis added). It read *Ellis* to hold that " 'Congress' essential justification for authorizing the union shop' limits the expenditures that may properly be charged to *nonmembers* under § 2, Eleventh to those 'necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative.' " *Id.* at 752 (emphasis added) (*quoting Ellis*, 466 U.S. at 447-48).
>
> Moreover, the Court repeatedly suggested that § 8(a)(3) was concerned with "the rights of *nonmembers* who are compelled to pay union dues . . . ." *Id.* at 58 (emphasis in original). For example, the petitioners had argued that Congress' rejection of a House bill that suggested regulation of union finances was significant in interpreting § 8(a)(3). The Court distinguished the bill by explaining that it had "sought to establish a 'bill of rights for union *members*' vis-a-vis their union leaders," and addressed "internal union affairs" rather than the "rights of nonmembers." *Id.* at 758 (emphasis in original). The Court added, "Congress understood § 8(a)(3) to afford nonmembers adequate protection by authorizing the collection of only those fees necessary to finance collective-bargaining activities. . . ." *Id.* at 759. And it concluded that "Congress understood § 8(a)(3) simply to enable unions to charge nonmembers only for those activities that actually benefit them." *Id.* at 760. [Pet. App. 19a-20a (footnotes omitted).]

Recognizing that *Beck* is a National Labor Relations Act (NLRA) case and that this is an RLA case, the court of appeals added:

> Although *Beck* was decided under the NLRA, the Court relied heavily on the RLA and cases construing it. *Id.* at 745-746, 750-56, 761-62. Indeed, the Court stated that § 8(a)(3) of the NLRA and § 2, Eleventh of the RLA had "parallel purpose[s], structure, and language" and should be interpreted "in the same manner." *Id.* at 752. We thus find highly persuasive *Beck*'s extension only to nonmembers of the right to object. [Pet. App. 2a.]

As the Fourth Circuit opinion explains, this reading of *Beck* is consistent, as well, with this Court's earlier "union security" decisions under the RLA and in particular with *Machinists v. Street*, *supra*, the fountainhead of this body of law:

> The [*Street*] Court found the right to object for involuntary members of union shops by construing the RLA to authorize unions to compel fees only for the duties placed upon them by the RLA, namely, collective bargaining activities. In the absence of § 2, Eleventh, the unions could not have obtained any money from employees who chose not to be members of the union, *Street*, 367 U.S. at 762, 770, therefore the unions could only use this "coerced" money for the limited purpose for which § 2, Eleventh was enacted—to solve the "free rider" problem by sharing "the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." *Id.* at 764. The rationale, elucidated in *Street*, struck a balance. If coerced employees had to pay for the union's political activities, it would mean "that Congress sanctioned an expansion of historical practices in the political area by the rail unions." *Id.* at 770. The Court refused to allow unions greater power to collect money but also declined to curtail "the traditional political activities of the railroad unions." *Id.* The *Street* Court held that its holding meant "only that those unions must not support those activities, against the expressed wishes of a dissenting employee, with his exacted money." *Id.*

> The reasoning behind *Street* goes far to dissolve Kidwell's argument. Where the employee has a choice of union membership and the employee chooses to join, the union membership money is not coerced. The employee is a union member voluntarily. Moreover, to find that the union may not collect money for political activities from its members would curtail the political activities traditionally funded by voluntary union membership prior to the enactment of the RLA. *Id.* at 750-51, 770. [Pet. App. 17a-18a.]

And, as the court of appeals demonstrates, this Court's most recent RLA union security decision, *Ellis v. Railway Clerks, supra*, is to the same effect. "[I]n *Ellis* . . . the Court perceived a difference between 'voluntary members' and 'those whose membership is forced upon them.' [466 U.S.] at 445." Pet. App. 16a. Accordingly, "the [*Ellis*] Court reportedly referred to 'nonmembers' as the objecting employees." Pet. App. 16a. *See also id.* (quoting such references in the *Ellis* opinion).[5]

In sum, under this Court's decisions in *Street*, *Ellis*, and *Beck*, "§ 2, Eleventh of the RLA does not permit a union, over the objections of *nonmembers*, to expend compelled agency fees on political causes." Pet. App. 16a-17a (emphasis added), quoting *Beck*, 487 U.S. at 745. At the same time, however, these decisions *do* permit the union to expend the dues received from *full union members* in the same manner union dues moneys were spent before § 2, Eleventh was enacted. Pet. App. 17a-18a.

2. The *certiorari* petition makes no attempt to refute the Fourth Circuit's analysis of this Court's controlling

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[5] The *certiorari* petition notes, Pet. 14-15 n. 19, that some of the *Ellis* plaintiffs may have been union members. But those plaintiffs alleged that they had been *forced* to become union members by a union security clause that allowed employees who were already hired at the time the clause was negotiated to pay agency fees but required all later hires to join the union. *Ellis v. Railway Clerks*, Sup. Ct. No. 82-1150, Joint Appendix 80-81, 95 (complaint in *Fails v. Railway Clerks*, S.D. Cal. No. 73-118-S). As shown above, p. 2, *supra*, no such contention could be made in this case.

precedents. Instead, the petition argues that it would be unfair to condition full union membership on the payment of full union dues. This supposed unfairness lies in granting the union members willing to pay the union's dues a greater say than nonmembers in determining the union's collective bargaining policies. Doing so, we are told, "makes union membership involuntary as a matter of law!" Pet. 21.

The difficulty with this argument, as the court of appeals explains, is that it rests on a fundamental misunderstanding of the statutory system of collective bargaining through a union representative as elaborated in this Court's decisions:

> Kidwell's claim depends on an employee's right to participate in all aspect of all decisions related to conditions of employment. As discussed above [Pet. App. 21a-26a], however, the rights accorded an individual employee under the RLA are not so infinite. The employee, regardless of union membership, has the right to vote on the collective bargaining representative. The employee, regardless of union membership, has the right to be represented fairly and heard by the collective bargaining representative. But, if the majority of all employees should choose a union as representative, the employee does not have the right to participate in each and every aspect of the union's internal actions in carrying out its duties as representative.
>
> Therefore, at least so far as the RLA is concerned, the union can offer every employee two choices: (1) union membership, and with it, if the union is elected collective bargaining representative, a right to vote on the internal delegation of collective bargaining power, the ratification of the negotiated agreement, and any political or other cause in which the union by majority vote decides to participate but with the responsibility for paying complete dues or (2) a nonmembership with the right to vote on whether the union should be the collective bargaining representative and responsible, if the union is so

> elected, for paying only the portion of the dues related to collective bargaining activities. The union's refusal to allow objections by members does not violate the RLA. [Pet. App. 26a.]

The foregoing, like the balance of the opinion below, is firmly rooted in precedent. *Steele v. Louisville & Nashville R. Co.*, *supra*, establishes that a union chosen as exclusive representative under the Railway Labor Act "is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer. . . ." 323 U.S. at 204. The union is required not only to listen, "but to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." *Id.* However, at the same time that it defined the union's duty to fairly represent all employees—both union and non-union—the Court affirmed that "*the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership. . . .*" *Id.* (emphasis added).

Since *Steele*, moreover, this Court has repeatedly reaffirmed that the duty to fairly represent all employees does not deprive the union representative of its authority to order its own internal affairs. *See NLRB v. Financial Institution Employees*, 475 U.S. 192, 205 (1986) (unions, acting in their representative capacity, can "call a strike, ratify a collective bargaining agreement, or select union officers and bargaining representatives" and "non-union employees have no say in the[se] affairs of the union"); *Pattern Makers v. NLRB*, *supra*, 473 U.S. at 107-108 n. 18 (the strong incentive to join the union in order to have a voice in its decisionmaking processes is entirely consistent with "voluntary unionism").[6] *See also Scofield*

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[6] To explain why "[a]n employee who voluntarily has joined a union will be reluctant to give up his membership," the *Pattern Makers* Court quoted Dean Wellington:

> "In making his resignation decision, the dissident must remember that the union whose policies he finds distasteful will continue to hold substantial economic power over him as exclusive

v. NLRB, 394 U.S. 423, 424 n.1 & 431 (1969) (noting existence of union security clause and finding "no showing in the record . . . that the membership of the petitioners in the union was involuntary").[7]

3. In an act of desperation, the *certiorari* petition claims a conflict between the Fourth Circuit decision in this case and the District of Columbia Circuit's decision in *Marker v. Shultz*, 485 F.2d 1003 (D.C. Cir., 1973). Pet. 22.

The plaintiffs-petitioners did not so much as cite *Marker* in their briefs to the courts below, and with good reason. *Marker* did not involve the right to object under either the NLRA or the RLA, much less decide whether full union members have a statutory objection right.

Marker was, instead, "an action by workers in the aerospace industry, who [we]re required to pay union dues under compulsory union shop contracts, to enjoin Treasury officials from continuing to grant or recognize tax exemption status under § 501(c)(5) of the Internal Revenue Code in the case of any labor organization that expends tax free membership dues for partisan political campaigns. . . ." 485 F.2d at 1004. The D.C. Circuit

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bargaining agent. By resigning, the worker surrenders his right to vote for union officials, to express himself at union meetings, and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause." Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1046 (1976). [473 U.S. at 107-108 n. 18.]

[7] The *certiorari* petition suggests, as a "less onerous" alternative to requiring unions to accept members who refuse to pay full dues, that unions be required to allow non-members to vote on collective bargaining decisions. Pet. 21. This modest proposal is, among other things, squarely contrary to *Financial Institution Employees*—which, as just noted, states that unions may *not* be required to provide for such non-member participation—and to *Pattern Makers'* central rationale, *viz.*, that the Act accords employees a right to resign from union membership at will that is balanced by the members' exclusive right to determine the union's policies and programs.

rejected the claim of the *Marker* plaintiffs, finding that "it was the determination by Congress to keep the tax exemption of dues and contributions in a neutral stance, rather than to embroil the tax laws and the agencies administering them into involvement with and surveillance of the political activities of the unions." *Id.* at 1007.

In short, the question of whether full union members have a statutory or constitutional right to refuse to pay full union dues did not arise at all in *Marker*. Indeed, the D.C. Circuit decisions that do speak to this question recognize that the statutory objection right runs solely to "*nonmember employees.*" *Abrams v. Communications Workers*, 702 F. Supp. 920 (D.D.C. 1988) (emphasis added), *aff'd mem.*, 884 F.2d 628 (D.C. Cir.), *cert. denied*, 493 U.S. 992 (1989). *Accord Fitz v. Communications Workers*, 132 LRRM 2186, 2188 (D.D.C. 1989), *aff'd mem.*, 917 F.2d 62 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 1582 (1991) ("dissenting non-union employees"). This is the view of other circuits as well. *See Price v. International Union, U.A.W.*, 927 F.2d 88, 90 (2d Cir.), *cert. denied*, 112 S.Ct. 295 (1991) (objection right runs to "non-Union member employees").

* * * *

In sum, the Fourth Circuit's decision upholding TCU's rule that those who wish to be full union members must pay full union dues is dictated by this Court's precedents. The court of appeals' decision is, moreover, consistent with this Court's teachings as to the union role in the collective bargaining system and as to the differing rights of union members and non-members in determining how the union will fill that role. That being so, as is only to be expected, the Fourth Circuit's decision is in accord not only with this Court's decisions but, as well, with the other lower court decisions that have treated with the question presented here.

B. The First Amendment

The Fourth Circuit rejected the claim that there is a constitutional right to join a union, while refusing to abide by the union rule requiring payment of full union dues, on two distinct grounds: lack of state action, Pet. App. 30a, and a failure to state a sound First Amendment claim, even if there were state action, *id.* 31a. In both regards the court of appeals' decision is correct beyond peradventure of doubt.

1. With respect to the first of the Fourth Circuit's constitutional rulings, the *certiorari* petition falsely charges that "[t]he panel's decision find[s] no state action in an agency shop under the RLA," and by so doing "directly conflicts with this Court's finding of state action under the RLA." Pet. 17 (footnote omitted).

To the contrary, the court of appeals expressly relied upon *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1953), in recognizing that "[t]he coercive effect of the RLA over nonmember employees and its preemption of state law often give rise to state action. *Hanson*, 351 U.S. at 232." Pet. App. 29a. And the Fourth Circuit expressly followed *Hanson's* holding that "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates. . . ." 351 U.S. at 232.

The court of appeals also recognized, however, that to say the "enactment of the federal statute . . . is . . . governmental action" is not to say that everything done by a private association covered by the statute is also governmental action. Pet. App. 29a. While "[u]ndoubtedly the [government] [i]s responsible for [its] statute," it is equally plain that "[a]ction by a private party pursuant to [a] statute, without something more, [i]s *not* sufficient to justify a characterization of that party as a 'state actor.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 938, 939 (1982) (emphasis added).

Thus, the necessary—but unstated—premise of the *certiorari* petition's state action argument is that, because the RLA's union shop authorization is itself subject to constitutional limitations, *everything* done by a union covered by that authorization is also subject to constitutional limitations.[8] As the court of appeals' opinion notes, Pet. App. 30a, this state action theory flies in the face of the unbroken line of decisions—from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), through *National Collegiate Athletic Assoc. v. Tarkanian*, 488 U.S. 179 (1988)—finding *no* state action in the independent actions of various private entities operating pursuant to an overall statutory authorization.

And, as the Fourth Circuit recognizes, this state action principle was applied to internal union decisions in *Steelworkers v. Sadlowski*, *supra*, 457 U.S. at 121 n.16, where this Court held that a "union's decision to adopt an [election] rule does not involve state action." Pet. App. 28a.

2. As already noted, following its discussion of the state action issue, the Fourth Circuit appeals added, "even assuming state action existed, we do not believe that the choice offered to Kidwell violates any First Amendment rights." Pet. App. 30a. The panel justified

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[8] Unlike the RLA's union shop authorization, the NLRA's union security provisions do not preempt contrary state law, and simply declare that such agreements are not forbidden as a matter of federal law. 29 U.S.C. §§ 158(a)(3) & 164(b). The general rule is that such a "statutory refusal to act" is beyond constitutional review by the judiciary. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 166 (1978). *See, e.g., Corporation of the Presiding Bishops v. Amos*, 483 U.S. 327, 337-338 & n. 15 (1987) (although religious employers are exempted from Title VII's prohibition of religious discrimination, their actions are not "fairly attributable to the Government). RLA § 2, Eleventh has been deemed to be more than a "statutory refusal to act," *Flagg Bros.*, 436 U.S. at 166, because "Congress, by the union shop provision of the Railway Labor Act, sought to strike down inconsistent laws in 17 States," *Hanson*, 351 U.S. at 231-232.

this conclusion in a detailed constitutional analysis, Pet. App. 30a-37a. Once again, the *certiorari* petition does not even attempt to refute the court of appeals reasoning, and we, therefore, summarize this alternative holding in the margin.[9]

3. The *certiorari* petition does, however, seek support for its constitutional arguments from this Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which concerned the First Amendment rights of *public* employees. In this regard, it is asserted that *Abood* "involve[d] union members employed in agency shops." Pet. 14. However, as the Fourth Circuit accurately stated, Pet. App. 16a, the *Abood* Court was *not* called upon to decide whether full union members have the right to remain members while refusing to pay full union dues.[10] Thus, as the Fourth Circuit explained:

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[9] The court of appeals explained that it is not unfair to require an employee to choose between associating with the union as a member and refusing to associate as an objecting nonmember:

> The disincentives for Kidwell if she is not a union member . . . are not extreme. She can vote on the collective bargaining representative. She will always be fairly represented by that representative. And she can form a rival group for the non-collective bargaining activities. That membership does have some privileges is not enough to raise a First Amendment right to object. [Pet. App. 34a.]

The Fourth Circuit then went on to note that in *Minnesota Bd. of Community Colleges v. Knight*, 465 U.S. 271, 290 (1984), this Court held that the exclusive right of members to participate in union decision-making does *not* infringe upon the right of nonmembers to refuse to join the union. Pet. App. 36a.

Moreover, as the court of appeals also noted, allowing employees to join the union without meeting the organization's dues requirements would interfere with "the right of an association to choose its members," which this Court has recognized in cases such as *Democratic Party v. Wisconsin, supra*. Pet. App. 36a.

[10] The complaint in *Warczak v. Detroit Board of Education*, Wayne Cty. Cir. No. 145080, named the union's members as the class of

> [T]he *Abood* Court concerned itself with reversing the ruling of the Michigan Court of Appeals that "state law 'sanctions the use of nonunion member's fees for purposes other than collective bargaining,'" 431 U.S. at 232 (*quoting Abood*, 230 N.W. 2d 322, 326 (1975)). . . . [T]he issue addressed was only whether the Michigan law that required *nonmembers* to pay agency fees used for non-collective bargaining purposes was permissible. [Pet. App. 16a.][11]

II. CLASS CERTIFICATION

The second question presented by the *certiorari* petition is whether the district court abused its discretion in refusing to certify a class of objecting employees. In this regard, as in all others, the decision below is entirely sound and is solidly based on the law as declared by this Court.

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defendants, *Abood v. Detroit Board of Education*, 60 Mich. App. 92, 230 N.W.2d 322, 323 (1975), and alleged that the union "carries on various social activities for the benefit of its members which *are not available to nonmembers.*" *Abood v. Detroit Board of Education*, 431 U.S. at 213 (emphasis added). The complaint filed in *Abood v. Detroit Board of Education*, Wayne City. Cir. No. 155255, alleged that the "Plaintiffs have *not* become members of the Detroit Federation of Teachers. . . ." *Abood v. Detroit Board of Education*, Sup. Ct. No. 75-1153, Appendix 46 (emphasis added).

[11] The petition also quotes selectively from *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-666 (1990), to support its argument that as a general matter union members have an objection right. Pet. 17. While the quoted passage from *Austin* does refer to "members" having the right to object, in the very next sentence the Court makes clear that its reference is to situations in which "a union and an employer . . . *require that all bargaining unit employees become union members*. . . ." 494 U.S. at 665 (emphasis added). Where, as here, there is no such requirement, as the Fourth Circuit concluded, "read in context . . . *Austin* does *not* support a member's right to object." Pet. App. 33a-34a (emphasis added) (footnotes omitted). *See also id.* nn.13 & 14.

A. The district court denied certification of a class of all objecting employees on the following grounds:

> The defendants raise numerous problems with class certification with which the Court agrees for the most part. A class of persons which projects into the future to include persons who may or may not object is too indefinite for certification. In addition, the named plaintiffs' factual circumstances are not representative, or even typical, of the circumstances of those whom they purport to represent. "[A] class representative must be part of the class and 'possess the same interest and *suffer the same injury*' as the class members." *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982) (citation omitted, emphasis added). In this case, however, some of the employees who objected, including all of the plaintiffs, received a reduction in each year that they objected. Other objectors, on the other hand, received no reduction. [Pet. App. 78a.]

The Fourth Circuit "conclude[d] that the district judge's ruling was not an abuse of discretion" for the following reasons:

> [T]he plaintiffs have not met the "typicality" and "commonality" requirements of Rule 23. In this case, as in others, the commonality and typicality requirements merge. *See Stott* [*v. Haworth*], 916 F.2d [134,] at 143 [(4th Cir. 1990)]. "Both serve as guideposts for determining whether . . . the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected. . . ." *Id.* (*quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982)).
>
> The plaintiffs have not suffered any injury, never mind an injury similar to that of those whom they seek to represent. The plaintiffs claim that they have suffered "the injury of having monies taken from them, over their objections, in the absence of the procedural safeguards required by *Hudson*" and

> that the same injury accrues to all objectors. However, the district judge found that "the plaintiffs suffered no actual injury as a result of the invalid practices, which have since been eliminated." The judge denied the plaintiffs even the nominal damages of $1.00 for a denial of due process. The plaintiffs have not appealed that ruling. [Pet. App. 42a.]

The *certiorari* petition does not challenge the finding of the district court, affirmed by the court of appeals, that the plaintiffs-petitioners "have not suffered any injury, never mind an injury similar to that of those whom they seek to represent." Pet. App. 42a. Nor does the petition challenge the rulings below that under *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), this finding requires denial of class certification.

Thus, there is simply no basis at all for finding that the district court abused its discretion in denying certification of a class of objecting employees.

B. Ignoring the grounds on which the district court and the Fourth Circuit denied class certification, the *certiorari* petition charges that "[c]oming unexpectedly and entirely out of left field, the panel decided to base its affirmance of the district court's denial of certification of a subclass on its reaction to the putative class representatives' association with and content of the political litigation program of the National Right to Work Legal Defense and Education Foundation, Inc." Pet. 22. The Fourth Circuit, we are told, was "blinded by its unconstitutional considerations," *id.* at 24, *viz.*, the court below's supposed "jaundiced, nonrecord opinion" of the Right to Work Foundation, *id.* at 23.

This harsh invective is directed at the Fourth Circuit's remark that "[t]he Seventh Circuit has cogently explained the dangers of class certification in a remarkably similar context," followed by a quotation from Judge Posner's opinion in *Gilpin v. AFSCME*, 874 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989). Pet. App. 43a.

In the quoted passage, Judge Posner notes the danger of certifying a class where there is a conflict of interest among class members with respect to remedies. But neither the *Gilpin* court nor the court of appeals here "presumed [the] political content of the Foundation's expressive litigation program to be malicious, as a matter of law," or "allowed that determination of maliciousness to color and prejudice its review of the propriety of the district court's denial of class certification." Pet. 24.

To be sure, neither court "praised and acknowledged the legitimacy and noble objective of the Foundation's work," Pet. 26, as the Foundation would have hoped. Be that as it may, we do not believe that a litigator's disappointment at failing to receive a judicial commendation provides a proper occasion for heaping abuse on the Fourth and Seventh Circuits, much less for granting a writ of *certiorari* to review the legally unexceptionable opinions in *Gilpin* and in this case.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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BRIEF

Supreme Court, U.S.
FILED
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No. 91-1344

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KATHRYN A. KIDWELL; MICHAEL S. COFFMAN; HELEN EADES; RAMONA J. ELLIS,

Petitioners,

v.

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONERS' REPLY BRIEF

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April 1992

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II. THE FOURTH CIRCUIT'S CONSIDERATION OF THE PUTATIVE CLASS REPRESENTATIVES' ASSOCIATION WITH AND THE PRESUMED POLITICAL LITIGATION PROGRAM OF A BONA FIDE, PUBLIC INTEREST LEGAL ASSISTANCE ORGANIZATION IN DENYING CLASS CERTIFICATION CONFLICTS WITH THE NINTH CIRCUIT'S RECOGNITION THAT NONCERTIFICATION WOULD IMPAIR THE CONSTITUTIONAL RIGHTS OF ASSOCIATION AND MEANINGFUL ACCESS TO THE COURTS. 8

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ARGUMENT

I. LABOR ORGANIZATIONS PERFORMING THEIR STATUTORY DUTIES AND ACTING PURSUANT TO FEDERAL POWER ARE *NOT* TRULY PRIVATE ASSOCIATIONS, BUT INSTEAD, ARE SUBJECT TO THE RESTRAINTS OF THE RAILWAY LABOR ACT, THE FIRST AMENDMENT AND THE STATUTORY AND CONSTITUTIONAL REQUIREMENTS ESTABLISHED BY THIS COURT IN *STREET, ABOOD, ELLIS,* AND *BECK.*

Respondents' Brief in Opposition ("Opp.") ignores the questions presented to this Court as well as the issues ruled upon by the courts below. Contrary to the claim of respondent Transportation Communications International Union ("TCU" or "union"), petitioners Kidwell and the subclass of union members she represents[1] do not seek "to be full union members **on their own financial terms**," Opp. at 5 (emphasis in original), nor determine for themselves eligibility to union membership, *id.* at 10. Instead, they challenge TCU's policy of using the federally granted power of an exclusive bargaining representative to compel union members, over their objections, to support fully the political, ideological and nonbargaining causes of the union by enhancing the rights and privileges of union members to participate in the collective bargaining process, while such heightened participation is denied nonmember agency fee payers.

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[1]In a footnote, Opp. at 3 n.2, TCU states that in the courts below Kidwell was identified as the representative of a class of objecting TCU members, but did not designate her representative status on the cover of her *certiorari* petition, although she did note her representative status in the petition itself, Pet. at 9. We fail to understand the significance of the union's footnote, especially since the Notice of Appeal listed "Certified Class Members" in both the caption and body, District Court Record ("R.") #72, and this Court's Rules consider "[a]ll parties to the proceeding whose judgment is sought to be reviewed [to] be deemed parties in this Court," unless certain action, not taken here, has been taken, *see* Sup. Ct. Rule 12.4.

It was TCU using its government–derived powers, not the objecting employees, which confronted Kidwell and the other dissenting members with the discriminatory dilemma of choosing between "the option of protecting free speech or of protecting [their] vote on the continuation or conditions of work, but not both." Petition Appendix ("App.") at 53a.[2]

The district court held, consistent with fifty years of this Court's precedents, that since TCU, **in its role as the exclusive bargaining representative by virtue of the Railway Labor Act, 45 U.S.C. § 152, Fourth**, limits meaningful participation in the collective bargaining process to union members, it cannot condition participation in shaping the terms and conditions of one's employment on foregoing one's statutory and First Amendment rights not to support the union's political, ideological and other nonrepresentational causes, or vice versa. App. at 2a, 6a–7a, 44a; 46a–56a; 74a–77a. The question presented to this Court is whether the Fourth Circuit erred in reversing that holding.

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[2]In January 1989, TCU sent Kidwell and the other union members who had objected to the use of their dues on activities deemed not germane to collective bargaining the following letter:

> TCU has revised its procedures for objecting to expenditures not germane to collective bargaining so as to permit only non–member agency fee payers to file objections. Agency fee payers are employees who meet their financial obligations by paying all dues, fees and assessments, but elect not to become actual members of the Union. They are eligible for all economic benefit programs, including strike benefits, death benefits and disaster relief. **However, they are not eligible to . . . participate in . . . contract ratification.** . . .
>
> Our records indicate that you are a member. If you wish to **forfeit the rights of membership** and become an agency fee payer, you may resign. . . .

App. at 85a (emphasis added).

The Fourth Circuit and TCU incorrectly believe, *see* App. at 19a–21a and Opp. at 5–7, that this Court in *Communications Workers v. Beck*, 487 U.S. 735 (1988) decided the question of a union member's right to object against Kidwell. They base this belief on this Court's repeated references in *Beck* to "non-members." Naturally, most[3] references are to "nonmembers" rights, since *Beck*, unlike the instant case, was brought by and concerned **only** nonmembers. However, it is overreaching to suggest that this Court's rephrasing of the broader "employee's objection" language in *Machinists v. Street*, 367 U.S. 740, 768–69 (1961)[4] and *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984),[5] cases which involved **both** union and nonunion members, to "objections of nonmembers" in *Beck*, 487 U.S. at 745,[6] constitutes a reversal of the broader application of those earlier holdings to union members.

TCU does recognizes at one point, if only briefly, the crux of the question presented. "This supposed unfairness lies in granting the union members willing to pay the union's [full] dues

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[3]This Court did, however, discuss the similar rights of "dissident union **members** as well" in *Beck*, 487 U.S. at 753 n.8 (emphasis added).

[4]"[W]e hold . . . that § 2, Eleventh is to be construed to deny the unions, over an **employee's objection**, the power to use his exacted funds to support political causes which he opposes." *Id.* (emphasis added).

[5]"But the authority to impose dues and fees was restricted at least to the 'extent of denying the union the right, over the **employee's objection**, to use his money to support political causes which he opposes,' 367 U.S., at 768, . . . even though Congress was well aware that unions had historically expended funds in the support of political candidates and issues. Employees could be required to become 'members' of the union, but those who objected could not be burdened with any part of the union's expenditures in support of political or ideological causes." *Id* (emphasis added).

[6]"Over a quarter century ago we held that § 2, Eleventh of the RLA does not permit a union, over the **objections of nonmembers**, to expend **compelled agency fees** on political causes." *Id.* (citations omitted, emphasis added).

a greater say than nonmembers [whom TCU "allows" to pay only the union's costs of collective bargaining] in determining the union's collective bargaining policies." Opp. at 9. However, both groups are required by law to pay the union's full cost of performing the statutory duties of collective bargaining. The problem is that, as graphically demonstrated by TCU's 1989 letter to Kidwell, App. at 85a, the union, using that statutory power, then limits meaningful participation in determining its statutorily granted collective bargaining policies to **only** those who fully support the union's political, ideological and noncollective bargaining agenda.

Naturally, as found by the district court, App. at 47a, 52a–55a, this discriminatory limitation on participating in the collective bargaining process effectively coerces and compels employees to join the union. As such, these coerced members cannot be required to pay for the union's political activities, or else Congress would have unconstitutionally sanctioned an expansion of the rail unions' historical practice of relying on voluntary financial support for their political activities. *See Street*, 367 U.S. at 770.

Everyone agrees that coerced employees cannot be required to pay for the union's noncollective bargaining costs. *See* App. at 17a–18a; Opp. at 7–8. Everyone also agrees that employees are coerced where either the employer or union suggests those employees must become or remain full or formal union members as a condition of employment. *Id.* The parties and the courts below differ, however, when, as here, the compulsion to join the union is not the **employer's** condition of employment, but, instead, the **union's** discriminatory limitation on participating in the determination of the employees' continuation or conditions of employment.

As shown *supra* p. 2, it was the union that discriminatorily limited participation in the collective bargaining process, thus coercing and compelling employees to join it. It is TCU that has made a mockery of the choice between union membership and nonmembership. And, the union has the power to make union

membership truly voluntary so that *Street*, *Ellis*, and *Beck* would not limit its collection and use of members' dues. However, until its discriminatory limitation on participating in the collective bargaining process is eliminated, TCU is required by the RLA to allow all involuntary members of the union to object to the union's political, ideological and nonbargaining expenditures.

> In short, Congress was adequately informed about the broad scope of union activities aimed at benefiting union members, and, in light of the absence of express limitations in § 2, Eleventh it **could be plausibly argued** that Congress purported to authorize the collection from involuntary members of the same dues paid by regular members. This view, however, was **squarely rejected** in *Street*, over the dissents of three Justices, and the cases that followed it.

Ellis, 466 U.S. at 446 (emphasis added).

TCU argues that any effect its discriminatory limitation on participating in the collective bargaining process may have on employees is irrelevant because this Court in *NLRB v. Financial Institution Employees*, 475 U.S. 192 (1986); *Pattern Makers v. NLRB*, 473 U.S. 95 (1985) and *Scofield v. NLRB*, 394 U.S. 423 (1969), held that the duty to fairly represent all employees does not deprive the union of its authority to order its own internal affairs. Opp. at 10–11. None of these cases involved the degree of union compulsion caused here by the Hobson's choice TCU presented to Kidwell and the other objecting members.

Although the petitioners in *Scofield* made theoretical arguments that the mere fact of exclusive representation, without more, puts practical pressure upon the employee to join the union in order to have a voice as to her own terms and conditions of employment, this Court found "no showing in the record . . . that the membership of the petitioners in the union was involuntary." *Id.* at 430. Unlike *Scofield*, this case **does** contain a record and specific finding by the district court that TCU's discriminatory use of its power of exclusivity and the collective

bargaining process compelled union membership. App. 53a–55a, 74a–77a.

Financial Institution Employees, 475 U.S. at 203 n.10 (emphasis added), is also distinguishable, because it involved **affiliation**, not the collective bargaining process or conditions of employment. There this Court specifically found that "**affiliation** does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote * * * ."

Moreover, *Financial Institution Employees*, 475 U.S. at 201, did not involve a request by nonmembers to vote in affiliation elections or members being told they had to waive their right to vote in affiliation elections in order to claim their right to object and pay reduced dues. Instead, the precise issue concerned the power of the NLRB to circumvent the decertification procedures specifically provided for by statute. It also involved another issue not presented here — an employer's refusal to bargain because of the affiliation of the bargaining representative. *Id.* at 200, 203, 204, 205, 207.

Pattern Makers is more supportive of Kidwell's position than the union's. *Pattern Makers*, 473 U.S. at 104–114, invalidated a union's restriction on the right of union members to resign during a strike, because the internal union rule violated the national labor policy of voluntary unionism. More significantly, *Pattern Makers*, *id.* at 112–14, also rejected TCU's argument, Opp. at 13–15, that unions should be treated like other voluntary associations. Although a union rule may be valid under the common law of associations or contract, if it runs afoul of national labor law, public policy or the constitution, it must be invalidated. *Id.*, at 113–14; *see Ellis*, 466 U.S. at 443–44; *Scofield*, 394 U.S. at 430; *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418, 421, 424 (1968); *see also* Labor Management–Reporting & Disclosure Act ("LMRDA"), 29 U.S.C. §§ 411–415 (members' Bill of Rights).

TCU also argues that the discriminatory dilemma it imposes on employees is simply the result of an internal decision of an

independent private entity operating pursuant to a mere overall statutory authorization and thus involves no state action nor raises any First Amendment claim. Opp. at 13–15. However, TCU's actions complained of herein are neither "independent" nor internal, but directly concern the performance of the union's **statutory** duties, duties which deprive the employees of their common-law contract rights.

Moreover, the **effect** of the union's actions is to limit the employees' freedoms of association and speech, as to matters of **public** concern.. As Justice Douglas noted in his concurrence in *Street*, 367 S.Ct. at 777 (emphasis added): "Since neither Congress nor the state legislatures can abridge those [First Amendment] rights, they cannot grant the power to private groups to abridge them. As I read the First Amendment, it forbids any abridgment by government whether directly or **indirectly**." *Accord Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226–27 n. 23 (1977).[7]

The reliance of the Fourth Circuit, App. at 28a, 36a, and TCU, Opp. at 5, 14–15, on *Steelworkers v. Sadlowski*, 457 U.S. 102 (1982), and *Minnesota Bd. of Comm. Colleges v. Knight*, 465 U.S. 271 (1984), is also misplaced because they did not involve the issue presented here. *Sadlowski* involved **wholly** internal union rules governed by the LMRDA, 29 U.S.C. § 411, while *Knight* held that nonunion employees had no constitutional right to force the **government** to listen to their views. Moreover, unlike the instant case, *Knight*, at 273, 291 n.13, dealt with issues "outside the scope of mandatory bargaining," and "involve[d] no

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[7]In *Ellis*, 466 U.S.at 439, as well as *Beck*, 487 U.S. at 761–63, this Court assumed the continuing validity of *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 232 (1956), which found that the existence of governmental action under the RLA requires analysis of the free expression question. Moreover, nowhere does *Hanson* suggest that the constitutional scrutiny of the agency shop agreement was watered down because the governmental action operated indirectly. *See also Ellis*, 466 U.S. at 443, 444, 455–56; *accord Dean v. TWA*, 924 F.2d 805, 809 (9th Cir. 1991).

claim that anyone is being compelled to support [the union's political, ideological and other nonrepresentational] activities." More importantly, *Knight* explicitly recognized that "**employees** may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding [in *Abood*] that associational rights were infringed was the compulsory collection of **dues** from **dissenting employees**." *Id.* at 291 n.13 (emphasis added).

Likewise, *Democratic Party v. Wisconsin*, 450 U.S. 107, 124 (1982), does not support the union's discriminatory limitation on participating in the collective bargaining process as erroneously contended by the Fourth Circuit, App. 36a, and TCU, Opp. at 5, 15 n.9. First, government has not given one political party the power of exclusivity, nor are nonmembers of a political party denied the right to vote in the general election. Unlike the situation herein, the primary election is not the "only vehicle through which" the voter can determine his or her representative. Second, as this Court recognized in *Democratic Party*, 450 at 123 n.25 (emphasis added), a political party and its members may decide membership requirements "**so long as those requirements are otherwise constitutionally permissible.**"

II. THE FOURTH CIRCUIT'S CONSIDERATION OF THE PUTATIVE CLASS REPRESENTATIVES' ASSOCIATION WITH AND THE PRESUMED POLITICAL LITIGATION PROGRAM OF A BONA FIDE, PUBLIC INTEREST LEGAL ASSISTANCE ORGANIZATION IN DENYING CLASS CERTIFICATION CONFLICTS WITH THE NINTH CIRCUIT'S RECOGNITION THAT NONCERTIFICATION WOULD IMPAIR THE CONSTITUTIONAL RIGHTS OF ASSOCIATION AND MEANINGFUL ACCESS TO THE COURTS.

The union supports, Opp. at 16–18, the Fourth Circuit's consideration of First Amendment–protected matters and speculative assumptions concerning possible motivational differences in deciding class certification issues by suggesting that there may be other grounds to support the denial of certification

of one of the subclasses. However, the question presented concerns the permissibility of courts denying class certification on grounds that interfere with constitutionally protected rights, *see* Pet. at i, not just whether the courts below correctly denied certification of this subclass. Thus, the question presented is more significant, far–reaching and crucial to the workings of a free society than simply whether the denial of the subclass was correct. Of course, TCU would like to, but cannot, reduce the question to such a simplistic level.

Next, TCU belittles the seriousness of the question presented by asserting that Kidwell's[8] "harsh invective . . . directed at the Fourth Circuit . . ." was caused by her "litigator's disappointment at failing to receive a judicial commendation." Opp. at 18–19. While Kidwell or her undersigned counsel never expected nor sought a judicial "pat on the head," they certainly did not expect or seek the judicial "slap in the face" that they received for engaging in First Amendment–protected activity.

Unlike the Fourth and Seventh Circuits, the Ninth Circuit, when presented with the option of considering First Amendment-protected matters and the putative class representatives' associations in deciding class certification issues, properly declined. *Fentron Industries v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982). The Fund and its trustees opposed certification of a class of employee participants under the Fund, because they claimed that the employees' law suit was solicited by the employer.

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[8]The union attempts to de-emphasize the Fourth and Seventh Circuits' treatment of the Foundation as the appellant or appellant's counsel, and their consideration of the Foundation's expressive litigation program, in reviewing the propriety of denial of class certification. However, TCU undercuts itself by not referring to "Kidwell's position" and by belittling what "the Foundation would have hoped," Opp. at 19, as if the Foundation were either the petitioner, petitioner's counsel or both. TCU's Freudian "slip" further demonstrates the importance of resolving the question presented, which is here for the second time and will continue to arise unless this Court puts it to rest.

Based on this Court's decisions cited here by Kidwell, *see* Pet. at 23–24, the Ninth Circuit declined to decertify the employee class because "decertification here would impair the associational rights of employers and employees, *see In re Primus*, 436 U.S. [412,] 426 [(1978)], and meaningful access to the courts. *See United Transportation Union v. State Bar*, 401 U.S. 576 (1971)." *Fentron Industries*, 674 F.2d at 1305.

CONCLUSION

The petition should be granted as to both questions.

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